

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.948 OF 2005

WITH

CIVIL APPLICATION NO.39 OF 2002

Shri Uday Ashok Dahanukar ...Appellant

Versus

Avinash Wamanrao Dahanukar & Ors. ...Respondents

.....

Mr.G.S.Godbole for Appellant.

None for Respondents.

.....

CORAM: A.M.KHANWILKAR, J.

JUNE 22, 2006.

P.C.

1. Heard Counsel for the Appellant.

2. This matter is placed for final disposal in terms of order passed on 16th November 2005 while issuing notice to the Respondents. Respondents have been duly served as per the office noting. None appears for the Respondents. No reply has been filed to oppose this relief. Accordingly, I proceed to finally dispose of this

Appeal in terms of the notice dated 16th November 2005.

3. The short question that is raised in this Appeal from Order which challenges the Judgment and Order passed by the 4th Extra Joint District Judge, Pune dated 22nd February 2001 in Misc.Application No.522 of 1999 is that: whether appointment of Arbitrator in terms of the provisions of the Arbitration Act, 1996, having regard to the Arbitration Clause in the Agreement executed between the parties, is pre-requisite for invoking the jurisdiction of the Civil Court for grant of interim relief under Section 9 of the Act of 1996? This question arises in view of the opinion expressed by the lower Court in the impugned order while rejecting the application under Section 9 preferred by the Appellant in this Court.

4. Before I advert to the reasons recorded by the lower Court in the impugned order, it will be apposite to record that even the lower Court has noted in the impugned order that there is arbitration clause in the Partnership Deed executed between the parties, being clause No.14. Dispute

has arisen which will have to be resolved in arbitration proceedings is also noted by the lower Court. However, the lower Court has proceeded to non-suit the Appellant on the principal ground that so far, parties have not made any serious attempt for appointment of arbitrator or to take recourse to arbitration proceedings. It is in this backdrop, question which is formulated earlier will arise for consideration.

5. At this stage, I will straight away advert to the reasons recorded by the lower Court in rejecting the Application under Section 9 of the Act preferred by the Appellant, as can be discerned from Paragraphs 10 and 11 of the impugned Judgment which read thus:

"10. Before I proceed further, i would like to mention here that the petition was filed on 16.8.99 and till this date there is no reference of any dispute to any arbitrator and there is no agreement between the parties regarding the appointment of sole arbitrator. When the petition was filed, and application was moved vide Exh.5 claiming again interim relief i.e. to restrain the Respondents for alienating or operating any interest in the movable or immovable property of the partnership firm and the order of status quo has been passed which is still

in force.

11. On perusal of contents of the petition, it appears that the petitioner is interested to have the appointment of receiver only with intent to carry out the winding-up proceeds of the firm by sale the property and to claim distribution of the assets, though the prayer in respect of winding-up has been withdrawn subsequently, then the tenability of very petition was called in question for asking such final relief. When an application u/s.9 is filed before the commencement of the Arbitral proceeding, there has to be manifest intention on the part of the applicant to take recourse to the Arbitral proceeding, at the time when application u/s.9 is filed the proceeding have not commenced under Section 21 of the said Act. In the present case, it cannot be said that arbitral proceeding have commenced because no particular dispute has been referred. Merely because partner is entitled to have the settlement of account and distribution of assets to the extent of his share in the partnership on dissolution of the firm, it cannot be presumed that there is a dispute to be referred to arbitration. Even though the period of about 18 months has elapsed, there is no reference of any dispute to arbitration and, therefore, it would not be desirable to grant any interim relief that too of appointment of receiver on the basis of some vague allegations of mismanagement. Considering the nature of the business which has been carried out by the partnership firm, the firm is required to fulfil its obligation under the agreement entered into with the prospective buyers of the flats and to appoint receiver in such cases would not be just and convenient. The dispute regarding some of the flats is already going on between partnership firm and the bank from which the land has been obtained. The parties are related to each other and the disputes are going on in

Civil Courts. In the given facts it would not be desirable nor it would be just and convenient to appoint a receiver on the properties moveable or immovable of the partnership firm, nor Respondents could be ordered to furnish the accounts as prayed by the petitioner. In the result, I pass the following order."

6. In my opinion, the reason which has weighed with the lower Court is not germane to the point in issue. Section 9 of the Arbitration Act 1996 expressly provides that the party may, before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36, apply to the Court for interim measure of protection under Section 9 of the Act. In view of the expansive provision contained in Section 9, it is not possible to countenance the opinion recorded by the lower Court in the impugned Judgement. Counsel for the Appellant has rightly pressed into service exposition of the Apex Court in the case of **M/s.Sundaram Finance Ltd. vs. M/s.NEPC India Ltd. reported in AIR 1999 SC 565**, wherein the Apex Court has noted that application under Section 9 can be invoked even preceding issuance of notice for invoking arbitration clause.

7. In the circumstances, the order which is impugned in this Appeal from Order cannot be sustained. Accordingly, this Appeal succeeds. The impugned Judgment and Order is set-aside. However, to examine the correctness of the claim of the Appellant for grant or non-grant of interim relief in terms of Section 9 will have to be considered by the lower Court in the first instance. It is for that purpose, the parties will have to be relegated before the lower Court for decision on merits of the said contentions. Accordingly, the application being Misc.Application No.522 of 1999 filed by the Appellant before the lower Court is restored to the file of the concerned District Judge, Pune for being decided on its own merits in accordance with law. No order as to costs.

8. In view of the above order, accompanying Civil Application also stands disposed of.

A.M.KHANWILKAR, J.